



Signed: November 16, 2006

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
QMECT, INC., etc.,
Debtor-in-Possession.

No. 04-41044 T
Chapter 11

In re
FRED AND LINDA KOELLING,
Debtors-in-Possession.

No. 04-46443 T
Chapter 11

QMECT, INC., etc.,
Plaintiff,
vs.

A.P. No. 04-4190 AT
(Consolidated with
A.P. Nos. 04-4365 AT
and 04-4366 AT)

BURLINGAME CAPITAL PARTNERS II,
L.P., etc. et al.,
Defendants.

AND RELATED ADVERSARY PROCEEDINGS

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**MEMORANDUM AND ORDER DENYING MOTION FOR
POST-PETITION ATTORNEYS' FEES WITHOUT PREJUDICE**

Defendant Burlingame Capital Partners II, L.P. ("Burlingame") seeks an award of post-petition attorneys' fees and costs as part of its judgment in the above-captioned consolidated adversary proceedings. For the reasons stated below, the request will be denied without prejudice.

The above-captioned adversary proceedings were filed in two related chapter 11 cases--i.e., the case of Qmect, Inc. ("Qmect"), a corporation, and the case of Fred and Linda Koelling (the "Koellings"), shareholders of Qmect and guarantors of some of its obligations. In one of the adversary proceedings, Qmect sought to equitably subordinate Burlingame's claim and objected to the claims filed by Burlingame and its affiliate, Electrochem Funding, LLC ("Funding"). This proceeding was filed as an original matter in the bankruptcy court. The other two adversary proceedings were filed in state court initially, either by or against Qmect and/or the Koellings. Cross-complaints were filed in each proceeding. Both proceedings were removed to the bankruptcy court after Qmect's and the Koellings' chapter 11 cases were filed. The issues raised in these two proceedings were all governed by state law.

The Qmect case has since been converted to a case under chapter 7 of the Bankruptcy Code. Burlingame had previously obtained relief from the automatic stay and foreclosed on most, if not all, of its assets. Consequently, neither Burlingame nor Funding seek an award of attorneys' fees or costs against Qmect at this time. In addition,

1 the Court has determined that the Koellings have been released from
2 their guaranty of Qmect's obligations to Funding. Thus, Funding is
3 no longer seeking an award of attorneys' fees and costs from the
4 Koellings either. The only relief sought at present is by Burlingame
5 against the Koellings.

6 After the issues were narrowed by partial summary judgment, a
7 trial was held, beginning in October 2005 and ending in January 2006.
8 Burlingame prevailed on most, if not all, of the issues. The Court
9 made a determination of the amounts owed to Burlingame by the
10 Koellings, including pre-petition attorneys' fees and costs. The
11 award did not include post-petition attorneys' fees and costs.
12 Judgment was entered on August 14, 2006. The Koellings moved for
13 reconsideration, but the motion was denied.

14 At about the same time, Burlingame filed a motion, seeking an
15 award of its post-petition attorneys' fees and costs, to be included
16 in its judgment in these proceedings. A hearing was conducted with
17 respect to this motion on October 5, 2006. At the conclusion of the
18 hearing, the Court took the motion under submission. The Court now
19 concludes that the motion should be denied without prejudice.

20 **DISCUSSION**

21 Burlingame asserts a right to include its post-petition
22 attorneys' fees and costs in its judgment against the Koellings based
23 on its contracts with both Qmect and the Koellings and on Cal. Civ.
24 Code § 1717.¹ Included among the fees that Burlingame seeks to
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26 ¹Section 1717(a) of the California Civil Code provides that:
"In any action on a contract, where the contract specifically

1 include in its judgment are fees incurred litigating issues peculiar
2 to bankruptcy. At present, the law in the Ninth Circuit is clear
3 that an unsecured creditor is not entitled to include in its claim
4 its post-petition attorneys' fees incurred litigating issues peculiar
5 to bankruptcy. An unsecured creditor is entitled to include in its
6 claim its post-petition attorneys' fees for litigating issues
7 governed by nonbankruptcy law provided the creditor has a right to
8 recover its attorneys' fees based on contract or statute. See In re
9 Fobian, 951 F.2d 1149, 1159 (9th Cir. 1991).²

10 Burlingame contends that Fobian does not apply because it is not
11 at present seeking to include its post-petition attorneys' fees in
12 its unsecured claim against the bankruptcy estate. It is merely
13 seeking to include the fees in its judgment in these adversary
14 proceedings. Burlingame concedes that there is no present purpose
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16 provides that attorney's fees and costs, which are incurred to
17 enforce that contract, shall be awarded...to the prevailing party,
18 then the party who is determined to be the party prevailing on the
19 contract...shall be entitled to reasonable attorney's fees in
20 addition to other costs." Cal. Civ. Code § 1717(a).

21 ²The holding in Fobian seems inconsistent with 11 U.S.C. §
22 506(b). If an unsecured creditor is entitled to include its post-
23 petition attorneys' fees in its claim, what is the need for §
24 506(b)? The Ninth Circuit seems to have answered this question by
25 holding that a secured creditor is also entitled to include in its
26 secured claim, to the extent of the value of its collateral, its
post-petition attorneys' for litigating issues peculiar to
bankruptcy law. See In re Kord Enterprises II, 139 F.3d 684, 687
(9th Cir. 1998). Coincidentally, the issue of whether an
unsecured creditor is entitled to attorneys' fees for litigating
issues peculiar to bankruptcy law is before the United States
Supreme Court this term. It is scheduled for oral argument in late
January 2007. See Travelers Cas. & Sur. Co. v. Pacific Gas and
Electric, 167 Fed.Appx. 593 (9th Cir. 2006) (unpublished), cert.
granted, 127 S.Ct. 377 (2006).

1 for this determination. However, it envisions that various
2 contingencies might occur which would make such a determination
3 useful. The Koellings argue that it would constitute an improper
4 advisory opinion for the Court to make such a determination in the
5 absence of a present need for it. The Court agrees.

6 The Koellings also contend that it would be unfair to make them
7 undertake the work required to evaluate the reasonableness of the fee
8 request under these circumstances. They also note that the form of
9 the fee application is inadequate to permit them to do so in any
10 event. The invoices have been heavily redacted and have not been
11 segregated by task, and no narrative has been provided. Again, the
12 Court agrees.

13 Burlingame contends that it has supplied more than is required
14 already. It argues that all that is required to support a fee
15 request is a simple declaration that the fees have been incurred.
16 The Court has no doubt that, in some other case, some court has found
17 a simple declaration to be sufficient for its purposes. In this
18 case, however, given the multiplicity of the litigated matters and a
19 fee request of over \$1 million, the Court would not find a
20 declaration sufficient nor does it find what Burlingame has submitted
21 to date sufficient.

22 Burlingame's right to attorneys' fees is not governed by 11
23 U.S.C. § 330. Therefore, its fee application need not comply with
24 the rigorous format requirements of the Court's fee guidelines for
25 trustees and Court appointed professionals. Nevertheless, the fee
26 application must have sufficient specificity to permit the Court to

1 determine the reasonableness of the fees. In particular, given the
2 Court's conclusion that Burlingame may not obtain an award of
3 attorneys' fees for litigating issues specific to bankruptcy law,
4 clearly, the work performed and fees requested must be segregated by
5 task.

6 For that reason, the Court will deny Burlingame's motion without
7 prejudice. Burlingame may file and notice for hearing an amended
8 motion for fees. The amended motion must contain a narrative
9 describing the various tasks performed for which fees are requested
10 with a summary of the hours and fees related to each task. The tasks
11 must be fairly narrowly defined. For example, the Court would not
12 find it adequate if the amended fee application contained only two
13 tasks: e.g., one for issues governed by state law and the other for
14 issues governed by bankruptcy law.

15 The invoices must be revised to segregate the description of the
16 work performed by task so that the line items related to each task
17 appear consecutively. This may be done invoice by invoice or for the
18 case as a whole. The tasks identified on the invoices should
19 correspond to the tasks identified in the narrative as should the
20 hours and fees.

21 Given the ongoing litigation between the parties, the Court will
22 permit Burlingame to limit the copies of the invoices served on the
23 Koellings to redacted copies. However, unredacted copies must be
24 provided to the Court. The narrative must be served on the
25 Koellings.
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Based on the foregoing, it is
SO ORDERED.

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